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Voluntary peer review on competition law and policy: Botswana

Overview*

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Preface

This overview is a part of the full report entitled *Voluntary Peer Review of Competition Law and Policy: Botswana*.[1] The purpose of the exercise is to evaluate the competition law framework and enforcement experience of Botswana, identify the lessons to be learned and make recommendations that aim at improving the system in line with international best practice.

This overview examines the current state of competition law and policy in Botswana on the basis of an extensive review of relevant documents and a fact-finding mission to Gaborone to gather information on the experience of the Competition Authority and the representative of relevant stakeholders, including government ministries, sector regulators, private sector and academia among others. The review of documents included the Economic Mapping Report (2002), Legislative Inventory Report (2002), Competition Policy (2005), Competition Act (2009), Competition Bill (2017), different sector regulatory Laws, State of the Nation Address by the President of Botswana, Lieutenant General Doctor, Seretse Khama Ian Khama in October 2017, Botswana Vision 2036 document and the Eleventh National Development Plan.

A fact-finding mission to Botswana took place from 6 to 11 November 2017. During the mission, interviews were conducted with various institutions, government ministries, sector regulators, private sector representatives, case complainants and respondents, academia and other entities with interest in competition matters.

[1] UNCTAD, 2018 (forthcoming). The full report of the voluntary peer review of Botswana contains more detailed information pertaining to the enforcement of competition law, including an account of the interviews that UNCTAD conducted during its fact-finding mission to Gaborone.

I. Foundations and history of competition policy in Botswana

A. Introduction

1. The present report is based on information gathered during a fact-finding mission to Botswana conducted in October 2017 and information available from various sources, including government ministry websites. Legislative developments since information was first gathered have been considered in finalizing the report.

B. Historical, social, political and economic context

1. History and social context

2. Botswana, formerly known as Bechuanaland, is a landlocked country in Southern Africa that shares borders with Zambia to the north, Zimbabwe to the north-east, Namibia to the west and South Africa to the south and south-east. Its main seaport access is through South Africa. Botswana covers 582,000 km^2, which is a large area with a relatively small population estimated at 2,230,905 persons in 2016. Though sparsely populated, the Government of Botswana has committed resources to protect and preserve some of the largest areas of Africa's wilderness.

2. Political context

3. Botswana stands out for its political stability and good governance. The country represents Africa's longest running multi-party democracy, has a good human rights record and has been stable since independence. Botswana is a multiparty republic, with elections held every five years. The country's parliament consists of two houses: the National Assembly and the House of Chiefs. Appointed by parliament, the president is Head of State and Government, serving a maximum of two five-year terms in office.[2] As of 1 April 2018, the President is Mokgweetsi Eric Keabetswe Masisi.

3. Economic context

4. Botswana has recorded remarkable growth from the time of the country's independence from the United Kingdom of Great Britain and Northern Ireland in 1966. It has emerged as one of the fastest growing economies in the world, averaging 5 per cent per year in the last decade. The performance stemming from sound management of mineral revenues, mainly from diamonds, and good governance has led Botswana to reach the level of an upper middle-income country.

5. Vision 2036 is a road map employed by the Government of Botswana to meet its twenty-first century objectives. At its core, based on its four pillars, the Vision recognizes that the outstanding economic, social, environmental and governance issues of Botswana are interconnected. Botswana has a comparatively low inflation rate, averaging 3.5 per cent annually from 2014 to 2017, which is expected to remain within the lower end medium-term objective range of 3 to 6 per cent of the Bank of Botswana.

6. In line with the long-term Vision of Botswana, the Government has embarked on a cluster development initiative to enhance economic diversification in five priority sectors, namely beef, diamond beneficiation, financial services, mining and tourism. An action plan for capacity-building is being put in place for each of the clusters.

[2] All references pertaining to the text in this overview report are found in UNCTAD, 2018, *Voluntary Peer Review of Competition Law and Policy: Botswana*, forthcoming (United Nations publication, New York and Geneva).

C. Evolution of the competition law and policy of Botswana

7. Botswana has had an open economy since independence in 1966 and has consistently sought to strengthen the functioning of markets.

8. Beginning in 1999, Botswana started the process of looking at business conditions and thinking of how regulatory measures can be put forward to ensure a level playing field for business to operate. Two reports (an economic mapping report and legislative inventory reports) were finalized in 2002 to look at the market structure, conducts and laws, with a view to averting provisions in such laws that can be considered anti-competitive and harmful to consumer welfare. The endeavour was a consultative process spearheaded by UNCTAD and funded by the United Nations Development Programme through its country programme on private sector development.

9. The reports were used in drafting the Competition Policy, adopted in 2005, and a Competition Act, which was enacted in 2009 and became law in 2010. The Act provided for the establishment of a Competition Commission and a Competition Authority, launched in 2011 to deal with competition cases in merger control, abuse of dominance and other anti-competitive practices.

10. In recent developments, Competition Bill No. 22 of December 2017 was passed. A Competition Authority with a new name, the Competition and Consumer Authority, was established. At the time of preparation of the present report, the Competition Bill was awaiting presidential assent.

D. Competition policy framework

11. The National Competition Policy for Botswana was adopted in 2005 and aimed at harnessing the Government's desire to maximize the benefits of trade and investment liberalization, deregulation, privatization and safeguard the gains likely to be eroded by anticompetitive practices in a deregulated environment. The Policy also aims at addressing problems related to the globalization of cartels, abuse of market dominance and monopolization of key sectors, following the opening up of markets and the associated and incidental increase in cross-border trade matters, as well as investment flows.

E. Legal framework for competition law

12. The law in force is Competition Act No. 17 of 2010; the Competition Regulations of 2011 and the Rules of the Competition Commission (the Tribunal), 2012, should also be mentioned. In December 2017, the Parliament of Botswana passed the Competition Bill. Presidential assent is currently awaited, followed by promulgation by the Minister. This report will focus on the provisions of the Competition Bill, with selected references to the Competition Act.

II. Institutional framework for implementation of competition policy and law

A. The Competition Authority of Botswana

13. Section 4 of the Competition Act establishes the Competition Authority as a body corporate, capable of suing and being sued, subject to the provisions of the Competition Act.

Functions of the Competition Authority of Botswana

14. The Competition Policy mentions only the establishment of the Competition Authority and proceeds to proclaim that, as part of its responsibility in implementing the Policy and its related legislation, the Authority will have power to enforce the Competition Act, including conducting investigations, prosecuting transgressions of the Competition Act and presiding over disputes, whereas parties aggrieved by a decision of the Competition Authority will have the right to appeal to the High Court.

B. The Competition Commission of Botswana

15. Section 9 of the Competition Act establishes the Competition Commission, which shall be the governing body of the Authority and shall be responsible for the direction of the affairs of the Authority. The Commission shall adjudicate on matters brought before it by the Authority under the Act and give general policy direction to the Authority.

16. Considering the functions of the Competition and Consumer Authority (CCA), the appointment of members as well as power to initiate complaints and enforce compliance with the Competition Bill; the CCA may investigate impediments to competition in its capacity as a regulator.

C. Institutional set-up in Botswana under Competition Bill No. 22 of 2017

17. Section 6 of the Competition Bill establishes a body to be known as the Competition and Consumer Board, which shall be the governing body of the Authority and shall be responsible for the direction of the affairs of the Authority as well as general policy direction to the Authority.

18. The wording in the Competition Act portrays the Authority and the Commission as distinct bodies, whereas there are many other factors and indicators that Commission is the constitution of the Authority, implying they are one and the same. Much as the Competition Bill sought to remedy this shortcoming, the language in the text as provided above still poses the same risk of interpretation that the Authority and the CCA are distinct bodies.

D. Procedure for handling of notified mergers versus other restricted practices

1. Procedure for handling of notified mergers

19. The procedure for handling of notified mergers is provided under section 51(2) 51(3). An aggrieved party is given the opportunity to appeal to the Tribunal as per section 57 of the Competition Bill.

2. Procedure for handling other restricted practices

20. Pursuant to Section 36 of the Competition Bill, the CCA may, either on its own initiative or upon receipt of information or a complaint from any person, before commencing any investigation, conduct a preliminary inquiry into any practice where the CCA has reasonable grounds to suspect that the practice in question may constitute an infringement.

21. The procedure is such that the CCA may appoint an inspector to produce a report with respect to infringement of the above, pursuant to section 39 of the Competition Bill, and, within 12 months of completing the investigations, refer the matter to the Tribunal, if the CCA determines that a prohibited practice has been established, or issue a notice of non-referral.

E. The Tribunal

22. Section 62 of the Competition Bill provides for the establishment of the Tribunal, invariably, section 63 of the Competition Bill provides for jurisdiction of the Tribunal. The Tribunal has been established with two types of adjudicative powers, namely, the first instance and appellant.

1. First instance jurisdiction

23. The Tribunal shall adjudicate over any matter brought before the Tribunal by the Authority or by a complainant regarding a breach of any of the provisions of this Act.

2. Appellate jurisdiction

24. The Tribunal shall adjudicate over any appeal brought in accordance with the provisions of this Act.

25. The construing of section 73 is to the effect that all that is investigated under section 39 should be referred to the Tribunal within 12 months of completion of investigation for adjudication whereby the CCA shall prosecute the same at the Tribunal consistent with Section 5 (2) (o) and (p) of the Competition Bill.

26. Section 67(3) of the Competition Act, 2009 provides to the effect that an appeal against the Court's (High Court) judgment may be made to the Court of Appeal, but only on a point of law arising from the judgment of the Court, or from any decision of the Court as to the amount of a penalty. The Competition Bill has departed from this position, whereby sections 83 and 84 of the same make reference to appeals and judicial review to the High Court and stops thereafter.

27. It was revealed that the Authority has lost all cases at the Competition Commission, High Court and Court of Appeal on procedural technicalities and that there has not been any case decided on merits of competition by neither the High Court nor the Court of Appeal during the six years of competition law enforcement in Botswana.

28. Findings have revealed that competition expertise is not well developed in the High Court of Botswana for reasons that competition culture and its enforcement practice remains generally both low and new in Botswana.

29. Given the advantages for a specialized competition appellant body and, as the Tribunal has been established with both first instance and appellant jurisdiction, there should be room for manoeuvring, to attempt to fix the mechanism that would see all competition matters first dealt with by the CCA, then appealed at the Tribunal before they go on for further appeal at the High Court.

30. The Competition Bill provides for both rules and regulation-making powers in relation to operations of the CCA in sections 94 and 95. Based on the foregoing, as a general rule, CCA lacks the power to act beyond the scope of its enabling legislation (Doctrine of Ultra vires). The Competition Bill is unlikely to bring about any issues that relate to natural justice breach in so far as separation of powers; as such CCA is mindful of natural justice principle as described above.

F. Sanctions

31. Enforcement of compliance is usually criminal in nature. The Competition Bill provides that "any officer or director of an enterprise who contravenes Section 25 commits an offence and is liable to a fine not exceeding 100,000 pula or to a term of imprisonment not exceeding five years, or to both".

32. The Competition Bill does not categorically provide for the procedure to be followed when a person is to be committed to prison.

33. The Competition Bill in Section 76 (1), (2) and (3) sanctions, albeit discretionary, financial penalties to horizontal (section 25) and vertical agreements (section 25) to enterprises. The provisions provide that the Tribunal may, in addition to, or instead of, giving a direction, make an order imposing a financial penalty (not to exceed ten per cent of the turnover of the enterprise during the breach of the prohibition up to a maximum of three years).

34. The Competition Bill in section 58 (3) (b) sanctions unnotified mergers a fine not exceeding ten per cent of the consideration or the combined turnover of the parties involved in the merger, whichever is greater. The 0 to 10 per cent of the turnover range could be considered too wide and can pose challenges if specific guidance is not available to determine a commensurate level of financial penalty.

35. The Competition Bill does not directly sanction unnotified agreement prohibited by Rule of Reason under section 28 read together with section 33 of the Competition Bill and Abuse of Dominant Position under 31 of the Competition Bill. Upon conclusion that such infractions have been occasioned by an enterprise, section 77 of the Competition Bill provides that the Tribunal shall give the enterprise(s) concerned such directions as the Tribunal considers necessary, reasonable or practicable including some structural remedies mentioned in subsection 3 (c) of section 77.

36. There is a possibility for a mismatch of gravity of offences and penalties for offences that bear similar magnitude of effects in the economy and markets caused by enterprises equally convicted but equivocally convicted by the same Tribunal.

37. The ideal situation would be to de-link only the personal part of criminology as done under the Competition Bill and link all offences as against enterprise under sections 25, 27, 28, 31 and 59(2) of the Competition Bill so as to ensure offences with similar gravity are accorded commensurate and similar penalties.

III. Competition law enforcement

A. Mergers

38. Section 45(1) of the Competition Bill defines a merger. Section 45(2) of the Bill provides the manner that Acquisition may be achieved.

39. The term "merger" as defined in the Competition Bill does not include joint ventures resulting in the establishment of green field enterprises and the general provision under Section 45 (2) (b) cannot justify the omission of a specific provision to cover for such mergers. The underlying principle was that such joint ventures and strategic alliances have the same effect as pure mergers and should therefore be examined for possible anti-competitive effects.

40. Section 45 (3) of the Competition Bill has covered for the decisive influence test by referring to the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in companies act, in particular majority of shareholding to with 50 per cent or majority of voting rights in a company. This means, irrespective of the quantum of shareholding or voting rights that are at play in a merger transaction, should it result in a decisive influence change, the transaction amounts to a merger.

41. Section 46 of the Competition Bill is an "import" from section 53 of the Competition Act, it provides for exemption from mergers control by the minister. The provision empowers the minister to make regulations aimed at exempting enterprises from review of mergers based on the commercial or industrial sector involved, the nature of the activities in which the enterprise is engaged or some aspect of the general public interest. Furthermore, the minister may prescribe alternative system of merger review as the minister considers appropriate.

42. To date, the provision has not been put to operation, but it potentially bears inherent risk of misuse and or inconsistence to the spirit of the provision of section 3 of the Competition Bill, which presses for its application to the economic activities within, or having effect within, Botswana as the general rule.

43. Ordinarily, exemptions from application of the competition legislation is directed to sector specific regulations which has been provided for under section 86 of the Competition Bill and would cover all aspects of competition and not only mergers.

44. Section 49 of the Competition Bill provides for a pre-merger notification regime, which requires mergers with values at or above a prescribed threshold (currently $1,200,000 of the combined annual turnover or assets in Botswana of the merging parties).

45. Pursuant to section 63 of the Competition Act, which is currently in use as good law in Botswana, unnotified mergers were not sanctioned by any penalty other than directives to make good of the infraction. Invariably, pursuant to section 58 (3) of the Competition Bill, failure to notify a notifiable merger is an infraction that upon conviction attracts a penalty of a fine not exceeding ten per cent of the consideration or the combined turnover of the parties involved in the merger, whichever is greater. This is a good development in line with international best practice.

46. Under the Competition Bill, unnotified mergers are procedurally dealt with pursuant to section 58(2) read together with section 59(1).

47. The procedure for handling of unnotified merger is contentious and litigious just as is the process for revocation of an approved merger and rejection of a notified. Ordinarily, because of the resemblance, one would be inclined to expect the means involved in handling the likes to also be alike. Nevertheless, procedure for revocation of an approved merger and rejection of a notified merger is different from handling of unnotified mergers.

48. Revocation of an approved merger and rejection of a notified merger are dealt with at the CCA at first instance whereas unnotified mergers are de jure prosecuted at the Tribunal at first instance. This shortcoming should also be looked at for possible rectification for the betterment of competition enforcement on mergers and acquisitions aspect in Botswana.

B. Restrictive trade practices

1. Per se prohibited agreements

49. The horizontal per se agreements are dealt with under section 25 of the competition Bill, which covers conducts related to price fixing, division of markets and bid rigging alone. Despite the mention of the conducts, the Competition Bill has not provided for what would constitute elements for each prohibited conduct. Given the criminal nature and sanctions of infractions under section 25 as provided by section 26 of the Competition Bill, it would be prudent for the provision to expressly provide for elements that the CCA would have to establish for the criminal infraction.

50. Section 25 of the Competition Bill has not provided for commonly found horizontal agreement on output restriction between competitors and collective boycott by competitors, which many jurisdictions prohibit irrespective of their effects (per se).

51. The Competition Bill has not provided a clearly articulated procedure for giving effect to the criminalization of infractions provided under section 26. The only provision is that under section 5(2) (r) the CCA is required to report the investigation of all criminal matters under the Competition Bill to the Botswana Police Service. The Bill is not clear as to the role of police since the CCA is also an investigatory body mandated to investigate matters prohibited under the Competition Bill. The reporting the CCA does to the police, which may not necessarily be well vested with competition criminology, may set a serious hurdle to enforcement of the provision.

52. Ordinarily, since the CCA shall have finished its investigation, perhaps incidence into the criminal justice machinery could have been at the Director of Public Prosecution seeking the consent to prosecute the criminality with reference to seeking a custodial sentence before the appropriate Court of Law. It is also observed that the Competition Act has not specified which Court shall be used to enforce section 26.

53. It is also observed that matters related to section 25 are decided by the Tribunal at first instance following referral by the CCA of the Tribunal pursuant to section 73 of the Competition Bill. It not clear as to how the two processes of referring the investigated matter if referring the matter to the Tribunal and reporting the matter to the Botswana Police Service are going to be handled without clashing.

2. Agreements prohibited by rule of reason

54. Section 28 of the Competition Bill provide for horizontal agreements prohibited by rule of reason. Notification for rule of reason agreements is provided for under Section 28 (1) and (2) of the Competition Bill. Despite the fact that the exemptions for agreement assessment criteria is provided for under section 33 of the Competition Bill, the process for notification by the parties to the agreement has not been provided for under the Competition Bill. The provision should have expressly provided that parties to the agreement should apply to the Authority for the exemption.

55. The specific timeframe for which the agreement will be reviewed is not stipulated leaving the default time for investigation provided under section 73 (1) of the Competition Bill to wit the CCA shall refer the matter to the Tribunal within one year after it has competed its investigation. The provision as it is serves the unnotified agreements well just like the unnotified mergers are subjected to investigation procedure under section 39 of the Competition Bill. For those notified agreements, specific reasonable timeframes should have been assigned for the review process as provided for notified mergers, section 49 of the Bill.

56. With regards to the prohibitions under section 28(1) (b) (c) and (d) to wit agreement which (b) restrains production or sale, including restraint by quota; (c) involves a concerted practice; or (d) involves a collective denial of access of an enterprise in an arrangement or association crucial to competition. The provisions in (b) and (d) portray a mix up of prohibitions as they seem to refer to output restriction and collective boycott by competitors which are issues dealt with under per se prohibited agreements. On the other hand, (c) refers to concerted practice which has not been defined generally refers to an agreement in competition arena as opposed to unilateral practice leaving its existence wanting in the legislation.

57. With regards to the prohibitions mentioned in section 28 (2) (a) (b) (c), the provision under 28 (2) (a) can be construed to refer to output restriction, an issue dealt with under per se approach. Section 28 (2) (b) and 28 (2) (c) can be construed to refer to price discrimination and tying and bundling which are issues dealt with under abuse of dominance as prohibited exploitative conducts.

58. Based on the above, it is apparent that the concept of rule of reason has been lost as a result of mixing up of issues as explained. The cited shortcomings should also be looked at for possible rectification for the betterment of competition enforcement of agreements under rule of reason prohibitions.

C. Abuse of dominant position

59. Abuse of dominance prohibition provisions are usually drafted to target conducts by a dominant enterprise either unilaterally or in combination with other enterprises "combined dominance". Normally, the targeted conduct is one that "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market".

60. The Competition Bill does contain an express and general prohibition of abuse of dominance under section 31(1). The Bill also provides public interest considerations in the

course of establishing a dominant position under section 31(2). Dominant position is defined under section 32.

61. The provision provides for both situations of dominance, unilateral conduct and combined dominance in line with best practice of modern competition laws. However, a close look at the two provisions read together, it is observed that section 32 (a) and (b) provides for the threshold (market share) for which the enterprise(s) shall be determined as dominant in the defined relevant market without expressly mentioning a definite figure thus if construed loosely, it has a potential of protracted arguments on the same.

62. Invariably, it is observed that section 32 (a) and (b) lacks the condition precedent "potent element" of prohibiting only those conducts by dominant enterprise which "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market".

63. Specifically provided numerical thresholds and a condition precedent are helpful to establish and thus easier to be complied with as compared to other more flexible approaches which require in-depth understanding of competition which is vividly lacking in the developing world, including Botswana.

64. Section 31(2) permits for consideration of public interest issues listed in items (a) to (e) on discretionary basis in the course of investigation of abuse of dominance cases. Should the CCA opt not to take into account the public interest issues in its assessment, this subsection becomes inapplicable and harmless.

65. The issue arises when the CCA invokes section 31 (2) of the Competition Bill; the question is whether the CCA can decline to prohibit an abuse of dominance conduct under section 31 (1) (a) to (e) to the extent that it relates to a market in Botswana pursuant to section 3 1 (1) of the Competition Bill. The Competition Bill is silent on the effects of operation of section 31(2) on CCA's prohibition of an abuse of dominance conduct pursuant to section 31 (1) of the Competition Bill.

66. Section 31(2) refers to agreement of enterprise while assessing the application of public interest issues in determining abuse of dominance. This is taxonomically incorrect since agreements being them vertical or horizontal constitute a different category of prohibited practice dealt with under sections 25, 27 and 28 and are distinct from abuse of dominance issues. Invariably, it was earlier pointed out that there are issues of abuse of dominance that have been provided for under agreements prohibited by rule of reason provided under section 28 of the Competition Bill. Both these anomalies have to be looked at for possible rectification so as to avoid confusion to users of the law.

67. The list of abusive conducts under section 31(1) (a) to (e) has been drafted exhaustively thus legally, leaving no room for inclusion of those conducts not mentioned by the list. Ordinarily, such list would have been left open-ended (non- exhaustive) to accommodate all other theories of harm under the abuse of dominance prohibitions that may in due course arise in the course of development of competition law or those inadvertently left out, such as, loyalty discounts and rebates.

68. With regards to the specifics, during the period under review, there were 73 cases related to abuse of dominance practices of which 54 cases equivalent to 74 per cent were closed due to lack of competition issues, 9 cases (equivalent to 12.3 per cent) were closed for unstated reasons. This makes a total of 63 cases equivalent of 86.3 per cent of all abuse of dominance cases that were initiated during the period closed for either having no competition issues or other reasons. No case has been referred the Competition Commission and 9 cases (equivalent to 12.3 per cent) were still ongoing before the Competition Commission at the time of the peer review fact finding mission.

69. During the period under review, there were 38 cases related to horizontal and vertical agreements initiated. Twenty-one of these, equivalent to 55.3 per cent were closed due to lack of competition issues, whereas 9 cases equivalent to 23.6 per cent were closed due to other unstated reasons. This makes a total of 30 cases equivalent of 79 per cent of all horizontal and vertical agreements cases that were initiated during the period closed for either having no competition issues or other reasons. Four cases equivalent to 10.5 per cent

were referred to the Competition Commission and 4 cases equivalent to 10.5 per cent were still ongoing before the Competition Commission at the time of the peer review.

70. With regard to resale price maintenance, six cases were initiated, of which one case was closed due to lack of competition issues, four were referred to the Competition Commission and one is ongoing before the Competition Commission.

71. Moving forward, given the architecture of the Competition Bill with regard to the nature of prohibitions associated to the anticompetitive restrictive practices issues discussed earlier, and without prejudice to the sovereignty of Competition Authority and Competition Commission's decisions, it is logical to conclude that there is need for a new dawn ushered by the Competition Bill to properly provide for restrictive practices, identify offences associated to such practices and prohibit the same.

IV. Non-enforcement competition issues

Market studies

72. Market studies are conducted pursuant to section 5 (2) (g) of the Competition Bill, with a view to provide leads to the enforcement leg of the Authority as well as feeding into the advocacy wing of the Competition Authority with informed positions policies, programmes and other interventions that distort markets whilst being unenforceable.

73. The Authority has conducted five market studies recently, in aviation, shopping malls and retail sector (in-house brands). There is no evidence that findings of the studies have provided input to either enforcement or advocacy functions of the Authority.

74. The link between the studies and cases should be developed and grown for the good of competition practice in Botswana. Invariably, the small number of studies is proof of the need to recruit additional staff for investigations and legal departments.

V. Competition advocacy

75. The Authority carries out advocacy under section 5(2) (d) and (e) of the Competition Act which is in *pari materia* with the provision of section 5(2) (d) and (e) of the Competition Bill.

A. The Cabinet Minister

76. In Botswana, the Competition Authority and the CCA as the case shall be under the Competition Bill shall also be under the Ministry of Investment Trade and Industry.

77. The Minister has also been given powers to determine technical competition matters that should otherwise be left for the Members of the Commission and the Competition Act or the Board under the Competition Bill such as those discussed under mergers provisions, which allow the Minister to determine the fate of a merger, should be avoided. The Minister should be left with the general oversight and administrative parts of functioning of the CCA and the members that the Minister appoints based on their expertise and competencies to deal with technical matters.

B. Academia

78. The Department of Economics of the University of Botswana is working on a curriculum for the postgraduate diploma in the Economics of Competition Policy and Regulation, which may take at least one year to complete.

79. In future, the University of Botswana, Economics Department would wish to collaborate with the Competition Authority of Botswana in the area of market studies/research including outsourcing.

80. The Legal Department runs summer course on law of sales and credit agreement on consumer protection.

81. The Law Department recommended a memorandum of understanding (MOU) between the Competition Authority and the University of Botswana to cooperate on competition and consumer protection issues. The lecturers and students with an interest in competition and consumer issues could be invited to future competition advocacy and training events organized by the Competition Authority.

C. Business community

82. The interview of legal practitioners showed that there was very little interaction public education institutions; as such there have not been any established relationship. With regard to competition law practice, it was reported that there was no firm that specializes in competition, but business law practitioners were seen to be possible candidates for such specialization due to resemblance of the issues. It was further found out that, most legal firms had not placed competition as a priority on their agenda, partly because there was no direct demand for such services from the market and also because the Authority had not been active in using the Botswana Bar as a forum for promoting competition law practice.

83. Most of the interviewed key stakeholders reported that the Authority is mostly well known in the area of merger control, adding that a lot of work has been done.

84. It was revealed that there was no established relationship between the Business Botswana and the Authority neither is there found evidence that the Authority has taken advantage of the available platforms under the Business Botswana to advance its course.

85. It was also observed that the link between research and advocacy functions remain low or non-existent as there is no evidence of research work that has been used as input to advocacy work of the Authority for the past six years.

VI. Other laws of importance to competition law enforcement

A. Sector regulators

86. The CCA is deemed to have no jurisdiction over all the regulated sectors (network-based utilities), which would entail electricity, petroleum, water, gas collectively known as energy; communication; surface and marine transport, and civil aviation sectors. This is first, consistent with the National Competition Policy and also within international best practice on selection of sectors to be condemned to economic regulation. Invariably, since both the National Competition Policy and the Competition Bill under its section 86 (5) have provided for consultative mechanism for the CCA and the sector specific regulators; the understanding is clear that there should be concurrent jurisdiction between
the CCA and the sector specific regulators.

87. The Competition Authority has signed memorandums of understanding with regulators in the telecommunications and the civil aviation sectors. Without prejudice to the content of the referred MoUs, best practice is for the Competition Statute and those of the Sectoral Regulators who practice economic regulation to categorically provide for a mechanism of ensuring that the competition issues in the sectors under their respective economic regulation ambits are attended to. This can be done either by formulation of separate legal instruments or by instruments that refer such issues to the CCA. Reading of the enabling provisions of the two economic regulators visited together with the relevant provision of the Competition Act as well as the Competition Bill, do not provide for such a desired architecture.

88. Section 20 of the Telecommunications Act provides on monitoring of competition in telecommunications sector and the civil aviation legislation is silent on such matters.

The energy regulator has just been formed whereas the surface and marine transport regulator(s) have not been established.

89. Placement of competition and regulatory authorities under one central ministry, so as to avoid competing and conflicting policy objectives as well as the disjoint between competition and regulation in Botswana could be a solution to the observed mishaps.

B. Intellectual property

90. Intellectual property in Botswana is administered by the Companies and Intellectual Property Authority (CIPA) which is responsible for administrating four pieces of legislation. CIPA doubles as a business registrar as well as a patent registrar and administrator. As such, CIPA is more of a Registrar of Companies than a regulator.

91. Within the legal and policy framework for competition, intellectual property rights have been catered for in both the National Competition Policy and the Competition Bill. However, both the policy and the law in Botswana have exempted intellectual property.

92. Despite the exemption discussed above, CIPA and the Authority have a three-year-old MOU, which among other things has achieved coordination between the two and CIPA, has included in its checklist for amalgamations (mergers and acquisitions), a requirement for a letter of approval from the Authority to be filed by the merging parties.

93. At a later stage of development of the two legislations, CIPA and CCA should consider having cross-referencing of the enabling legislation so as to provide for evaluation of registered intellectual property rights.

C. Consumer protection

94. In Botswana, consumer protection issues have been dealt with pursuant to the provisions of the Consumer Protection Act No.42-07 of 1998. The Consumer Protection Office in the Ministry of Investment, Trade and Industry (MITI) has all along been implementing the Act. In December 2017 Parliament passed the Consumer Protection Bill No. 23 of 2017 into law and now awaiting to become law after presidential assent. Effective from the assent, the new Competition and Consumer Authority will be implementing both competition and consumer protection laws in Botswana.

95. Despite the fact that there have been no consumer protection issues dealt with so far, review of the Consumer Protection Bill passed can produce a few things that the CCA can watch for effective take off.

VII. Organizational structure of the Competition Authority of Botswana

A. The Commission/the Competition and Consumer Board

96. Section 6 of the Competition Bill establishes the Competition and Consumer Board which shall replace the Commission which is its equivalent under the Competition Act. Section 7 of the Competition Bill provides for the Minister to appoint seven members and select from among them a Chair, as per subsection 4. The provision does not provide for any procedure to be followed by the Minister in exercising of these powers. Section 8 provides for tenure of the members as not exceeding five years with a possibility of one further term of same tenure. A maximum of 10 years can be considered long enough for members to make a meaningful contribution to the CCA.

97. Nevertheless, the Minister can within the law as written appoint members for less than the stipulated five years and if misapplied can lead to problems faced by other jurisdiction of shortness of tenure of members and even absence of the Board or Commission such as the case for the United Republic of Tanzania in 2015/16. This ensures

there is continuity of the business of the CCA at all times especially when applied prudently to ensure longevity of tenure of all members occasioned by staggered appointments of 5 years to all members in compliance with the provision.

B. The secretariat

98. This consists of the Chief Executive Officer (CEO) and the rest of the staff. Accordingly, there is a very strong link between the Investigations Department and the Legal and Enforcement Department, as well as the Mergers and Monopolies Department.

99. The Ministry responsible for the Commission approves the organization structure under the Competition Bill, However, adjustment would need to be done in order for the proposed structure to accommodate the inclusion of Consumer Protection issues under the mandate of CCA. This is an avoidable constraint that the CCA should be allowed to vary the organization structure without involving the Ministry so as to hasten processes for operational efficiency purposes.

100. With regard to the competition functions, it is important to design an organization structure that will allow for end-to-end completion of the tasks performed by one department. This is to say the directorate that handles whichever of the restrictive trade practice should be able to handle the whole case to finality of the same.

VIII. Resources of the Competition Authority of Botswana

101. The Authority has a human resources base of 34 staff, out of which 16 are technical, whereas 18 from the Office of the CEO and Corporate Services are mostly support staff. Most of the current employees were relatively experienced and familiar with the functions they perform at the Authority, having worked for the Authority for at least four years. Only a few were new to the Authority.

102. Since its inception in 2011, a lot of time and resources have been spent on training and retraining Authority staff in investigations, prosecution and economic analysis, as well as relevant specialised professional areas in support services. There are no severe complaints on the part of staff in relation to remuneration on the part of the staff of the Authority; a problem that exists in most of competition authorities within the region. It was also observed that the level of staff turnover is relatively low

103. The Authority does not have a sufficient number of staff specifically dealing with ICT, despite existence of justifiable demand for an additional full-time employee, preferably a manager to manage ICT affairs of the Authority.

104. Regarding financial resources, the Authority has insufficient funds to carry out the broad mandate it has been statutorily given. The only reliable source is the Government subvention, which should ideally be the only source of funds for the CCA. It was revealed that the Treasury has the discretion to take the merger fees from Authority although so far that has not happened.

105. There is evidence from the practice of coexistence of competition and economic regulation that economic regulatory authorities have often had excess money that emanate from their regulatory functions. Other jurisdictions (Turkey and the United Republic of Tanzania) have statutorily provided in their competition laws that they shall receive funds from the regulated sectors authorities based on the principle that the two serve the same consumer hence need for sharing to avoid multiple levies by the authorities that be.

IX. Judiciary

106. Section 67(3) of the Competition Act, 2009 provides to the effect that an appeal against the Court's (High Court) judgment may be made to the Court of Appeal, but only on a point of law arising from the judgment of the Court, or from any decision of the Court as to the amount of a penalty. The Competition Bill has departed from this position,

whereby sections 83 and 84 of the same make reference to appeals and judicial review to the High Court and stops thereafter. Consultation with the Attorney General Chambers confirmed that the Court of Appeal provision was removed because it was redundant. All High Court matters are appealable to the Court of Appeal.

107. This confirmation by the Attorney General Chambers should be looked at and be adopted by the Judiciary with a view to ensure that competition cases are not excluded from the benefit of the scrutiny of the Court of Appeal thus offering either a secondary or tertiary chance of appeal to the aggrieved parties in the course of dispensing competition justice in Botswana.

X. General considerations and policy recommendations

108. There is need for the political system to assure all investors, domestic and foreign, of their protection and access to fair, equitable, transparent and accountable investment opportunities, processes and incentives thereto.

109. Now that under the Competition Bill the CCA and the Tribunal are poised to be separate legal entities, experience elsewhere is that the duo coexists in a high-paced and time-limited working environment, whereby personal working relationships may not be prioritized.

110. It is important that the CCA and the Tribunal engage in more team-building activities to influence a greater team spirit.

A. Recommendations addressed to the Government

111. There should be sufficient allocation of financial and human resources to cover the observed gaps so as to ensure sufficiency at the Authority.

112. The Authority should be enabled to exercise independence to vary working tools such as the organizational structure without the need for Ministry to endorse the same to allow more flexibility and increased efficiency of delivery.

113. Consideration should be given to placing sector economic regulation authorities and the Competition Authority under the same central Ministry wherever possible to promote their coexistence, independency and efficiencies.

B. Recommendations addressed to the Competition Authority of Botswana

114. The institutional set-up and practice for the enforcement of competition should be revisited with a view to creating a practical and dynamic set-up that assures the necessary parties of their basic procedural rights.

115. There should be placement of required skills and competences in departments so as to meet the delivery expectation on an end-to-end basis that reduces interdepartmental dependency, in particular legal minds in all enforcement related departments.

116. Capacity-building and training of staff should be accorded priority, including staff needs assessment to guide the training programmes to be developed.

117. With the new mandate on Consumer Protection, there is need to produce a road map report on the merging of the two functions and assign competencies in the two areas.

118. Commensurate capacity-building and training on consumer protection, including needs assessment to guide the training programmes needs to be developed.

119. Work with local universities to develop a curriculum on competition and consumer protection should be undertaken.

120. Consider establishing an annual conference on competition law with the Law Society in Botswana and its related stakeholders would also be necessary, along the lines of the American Bar Association's annual antitrust meetings held in the second quarter.

121. Tailor-made advocacy programmes, which address specific target groups in the economy, including the business community, consumer organizations, government ministries and departments, the judiciary and business lawyers, should be developed.

C. Recommendations addressed to the judiciary

122. There is need for more interaction between the CCA and the judiciary.

123. The judiciary should consider attending certain forums on competition law enforcement to interact with other judges handling competition issues and thus enhance and sustain such knowledge and skills.